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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

AMENDMENT OF THE COMMISSION'S
RULES TO PROVIDE CHANNEL EXCLUSIVITY
TO QUALIFIED PRIVATE PAGING SYSTEMS
AT 929-930 MHZ

PR Docket No. 93-35

To: The Commission

COMMENTS OF PACTEL PAGING

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SUMMARY

PacTel Paging ("PacTel") supports, with minor modifications, the Commission's proposal to provide channel exclusivity in certain circumstances to qualified PCP systems at 929 MHz to 930 MHz.

The proposals respecting the minimum numbers of transmitters needed to qualify for exclusive use in a local, regional or national territory are adequate to assure a seriousness of operating intent by participating companies. Clarifications are needed, however, on the circumstances in which transmitters will count toward the threshold.

Similarly, PacTel supports rules requiring that transmitters be disbursed throughout the area of exclusivity, but suggests revisions to the particular proposal for regional systems.

Finally, PacTel suggests modifications in the construction and bond requirements to fully achieve the stated objectives.

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To: The Commission

COMMENTS OF PACTEL PAGING

PacTel Paging ("PacTel"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking^{1/} (the "Notice") which proposes amendments to the Commission's Rules to provide channel exclusivity in certain circumstances to qualified private carrier paging ("PCP") systems operating at 929 to 930 MHz. The following is respectfully shown:

1. PacTel is a licensee under Part 90 of the Commission's rules.^{2/} PacTel has established several wide-area

^{1/} FCC 93-101, released March 31, 1993.

^{2/} PacTel also is licensed to provide common carrier paging service under Part 22 of the Commission's rules. Consequently, PacTel is particularly sensitive to the need for rule changes to enable private carrier systems to
(continued...)

929 MHz PCP systems in California, Nevada, Arizona, Georgia, Texas and Florida. PacTel serves in excess of 100,000 paging units over its various PCP systems. Based upon this operating

I. The Numbers Of Transmitters Proposed For
Geographical Exclusivity Are Reasonable, Though
Some Adjustments in the Counting Process Are Required

4. The Commission has made a concerted effort to adopt minimum transmitter construction requirements that will assure a sufficient presence in a territory to justify exclusivity. PacTel applauds this effort, but suggests some refinements in the general approach to assure fairness to all concerned.

5. The Notice fails to adopt NABER's proposal that several licensees can cooperate together and receive exclusivity in a territory. For instance, if two licensees currently have three transmitters apiece, and these transmitters otherwise meet the criteria for local exclusivity (e.g., they are within 25 miles of each other), then the two licensees should upon request be granted exclusivity for that frequency in that market and be protected from additional forced sharing. As suggested by NABER, the two systems should be protected to the extent of their combined interference contours.^{4/} This proposal serves the public interest by ensuring that the current problems experienced by VHF PCP systems resulting from numerous co-channel licensees are not replicated at 900 MHz. Also, it potentially extends the

^{4/} NABER Petition at n. 27.

benefits of exclusivity to smaller operators, and encourages cooperation among area operators.^{5/}

6. The Notice fails to make it clear whether the licenses and facilities of subsidiaries and affiliates may be aggregated to meet the construction requirements to achieve exclusivity.^{6/} Many regional and nationwide licensees today hold their Part 90 licenses in different subsidiaries and affiliates for bona fide accounting, tax, and regulatory reasons.^{7/} PacTel proposes that the Commission's rules permit a licensee to aggregate all of the licenses held by its subsidiaries and commonly-controlled affiliates^{8/} and to count them towards the exclusivity requirements.

^{5/} The Commission could limit the eligibility of multiple carriers to aggregate transmitters to meet the minimum standards to situations where the systems are operated in a coordinated, integrated fashion.

^{6/} The current rules imply that a single license would be required to hold all authorizations required in order to meet the minimum construction requirements. See, e.g., Section 90.495(a) "To qualify for exclusivity, applicants must construct and operate a local, regional, or nationwide paging system"

^{7/} For instance, PacTel Paging holds Commission authorizations in PacTel Paging, PacTel Paging of California, PacTel Paging of Virginia, PacTel Paging of Kentucky, and PacTel Paging of Texas.

^{8/} The Commission's rules recognize both actual (de facto) and legal (de jure) control. For ease of administration, PacTel recommends that applicants be presumed to control any entity in which they, a parent, or partner, hold, directly or indirectly, a greater than 50% ownership interest. The burden would fall on an applicant who wishes to claim control of an entity in which a 50% or less ownership interest is held to demonstrate de facto control.

A. Local Geographic Protection Areas

7. The Notice requires a licensee seeking local exclusivity to have at least 6 transmitters constructed for most markets in the United States. and 18 transmitters constructed to

serious operating intent which warrants exclusivity.^{14/} In PacTel's view, the transmitter requirements proposed by the Commission will serve the public interest by curtailing speculators who generally file and construct, if at all, one transmitter.^{15/}

9. The Notice is silent on whether a licensee who has justified the exclusive use of a frequency will be able to expand its area of exclusivity when it constructs additional transmitters in adjoining territories. Expansion should be allowed. Most paging licensees are continually extending the range of their systems because of market demands for broader geographic coverage. Local systems in the past provided coverage primarily to the business districts in a market. Today, local paging systems also cover the residential areas and recreational areas. PacTel proposes that a licensee with local exclusivity be allowed to increase its protected area as long as the transmitters meet the criteria (e.g., within 25 miles of another transmitter) and the extension of coverage does not overlap with another exclusive co-channel licensee's geographic area.^{16/}

^{14/} See NABER Petition at p. 9. In PacTel's view, the number of transmitters is a better indicator of seriousness of purpose than the percentage of area or population served since concentrated pockets of population, or operations at very high powers, could result in coverage of the required percentage with a minimum of investment.

^{15/} Id.

^{16/} For instance, a local exclusive licensee could expand into adjacent areas which are not the subject of another
(continued...)

B. Regional Geographic Areas

10. The Notice proposes to permit applicants to define their own region by aggregating up to twelve contiguous states. State boundaries, however, are not the most appropriate demarcation points for defining the limits of radio paging coverage since many trading areas with common commercial ties traverse more than one state. For example, the St. Louis trading area clearly falls in two different states: Missouri and Illinois.^{17/} If an applicant was allowed to define a region which included Missouri and not Illinois, the St. Louis commercial trading area would be subdivided, and the eastern portion of the St. Louis metropolitan area would not receive adequate coverage.

11. It does not serve the public interest to have only portions of a common trading area covered by a regional license. The Commission has recognized this in several recent allocation proposals which propose to rely upon Rand McNally's 487 Basic Trading Areas ("BTAs") or the 47 Major Trading Areas ("MTAs") as

^{18/}(...continued)

licensee's exclusive area (either regional or local). If the local exclusive licensee is surrounded by a regional exclusive licensee, it would be prohibited from expanding

the basis for licensing territories, rather than upon state boundaries.^{18/} Following this lead, PacTel proposes that applicants be allowed to define a geographic region comprising up to 12 contiguous states with the additional proviso that a Basic Trading Area encompassing counties in more than one state could not be subdivided.^{19/} For ease of administration, PacTel proposes that the counties in each of these BTAs be deemed associated only with the state that has most of the BTA population within its borders.^{20/} An applicant could define a region that included all states encompassing a BTA, or could define a region including only one of the states encompassing multiple state BTAs. In this latter case, the applicant would only be granted exclusivity in the counties of the BTA if the

^{18/}

See Rand McNally 1992 Commercial Atlas & Marketing Guide

selected state covered the major portion of the population of the BTA. Attachment 1 also sets forth the state with which each multiple state BTA should be primarily associated.^{21/} This proposal would enable a regional licensee to serve all of the population in a BTA without having to add to its region entire states^{22/} and would include states in which the licensee did not plan or want to build.

12. The Notice is silent on whether a regional licensee may alter its region once it has received exclusivity. The public interest would be served by permitting a licensee to modify its region in response to altered market demands for its

^{21/} For example, the Salt Lake City - Ogden, Utah BTA (No. 399) includes counties in Utah, Nevada (White Pine County) and Wyoming (Uinta County), with the largest portion of the population being in Utah. The Grand Junction, Colorado BTA (No. 168), Rock Springs, Wyoming BTA (No. 381) and Farmington, New Mexico - Durango, Colorado BTA (No. 139) also all contain counties from Utah (Grand County, Pagget County and San Juan County, respectively) but with the largest portions of the populations of these BTAs being in states outside of Utah (Colorado, Wyoming and New Mexico, respectively). Under the PacTel proposal, an applicant who includes Utah in its defined region but not Nevada, Colorado, Wyoming or New Mexico would be granted a region which includes White Plain County in Nevada and Uinta County in Wyoming, but excludes Grand Pagget and San Juan Counties in Utah.

^{22/} Following on the example from the preceding footnote, a regional licensee could garner authority to serve the Grand County, Nevada portion of the Salt Lake City - Ogden, Utah BTA without having to add the entire state of Nevada to its region with attendant obligations to serve Las Vegas, Reno, etc.

service.^{23/} Accordingly, PacTel proposes that a licensee should be allowed to alter its geographic region so long as the area which is added is not already granted exclusively to another

~~licensee. 24/ This would permit licensees to change their~~

system.^{27/} PacTel proposes that the Commission adopt the third alternative. The third alternative best serves the public interest because it allows all areas to have at least one licensee providing service.^{28/}

C. Nationwide Geographic Areas

14. The Notice limits nationwide exclusivity solely to the contiguous 48 states.^{29/} This limitation, which the Commission puts forth without any discussion in the Notice, fails to serve the public interest. The common carrier nationwide paging licensees receive grants without this limitation, which means that they offer nationwide service extending to Hawaii, Alaska and Puerto Rico. In order for the nationwide PCP licensees to compete effectively with the nationwide common carrier licensees, they will need geographic protection in these areas as well. PacTel proposes, therefore, that nationwide exclusivity for PCP channels also cover Hawaii, Alaska, and Puerto Rico.

^{27/} This alternative would allow a licensee to place transmitters even up to the border of the region so long as a co-channel licensee has not already placed facilities within the minimum separation distance.

^{28/} PacTel believes that the most likely provider of service will be the licensee which has the major economic area located next to the regional boundary. The major economic area is that with the greatest concentration of the population in the covered area.

^{29/} Notice at n. 40.

II. The Commission Should Add More
Symmetry to the Geographic Distribution
Requirements For Nationwide and Regional Systems

15. PacTel supports the adoption of requirements that transmitters be geographically disbursed throughout the exclusive licensing territory in order to count toward the minimum transmitter requirements.^{30/} There should be, however, more consistency between the distribution requirements applied to nationwide and regional systems.

16. The currently proposed requirements for regional exclusivity do not serve the public interest.^{31/} The Notice requires regional exclusive licensees to construct all top thirty U.S. markets which are in their region with the same number of transmitters as is required for local exclusivity.^{32/} This proposal appears to be misdirected. A regional licensee provides a service more akin to that of a nationwide licensee than to that of a local licensee.^{33/} Under the Commission's proposal, a

^{30/} Notice at ¶¶24 and 26.

^{31/} If the requirements for regional licensing are too high, the licensee will be required to construct more transmitters than necessary to provide the required coverage. This obviously does not serve the public interest.

^{32/} This requires a licensee in a top thirty market to construct six transmitters, each of which is within 25 miles of another transmitter, except New York, Los Angeles, and Chicago. In a region with New York, Los Angeles, or Chicago, the licensee would be required to construct 18 transmitters, each of which is within 25 miles of another transmitter.

^{33/} For instance, the current nationwide common carrier licensees each offer regional coverage options which are the
(continued...)

significant number of transmitters would be consumed in providing service in the top thirty markets when the market demand for service in these top thirty markets may be for traveller's coverage only.^{34/}

17. PacTel proposes that the Commission alter the regional distribution requirements to more closely parallel the nationwide rules. A regional licensee seeking exclusivity should be required to provide service in at least 12 markets in the region. This is based upon breaking the continental United States into four regions of 12 states.^{33/} In addition, to mirror the 25 out of top 50 markets requirement for nationwide exclusivity in the Notice, a regional licensee would be required to provide service in one-half of all top 50 markets in the

^{33/}(...continued)

most logical competition to these new exclusive PCP regional systems.

^{34/} In today's paging market, there are two different kinds of coverage: local coverage, and traveller's coverage. Local coverage encompasses most of the public in the local service area. Multiple transmitters are added to assure coverage in especially difficult areas, such as hospitals and high-rise office buildings. Traveller's coverage, on the other hand, is designed to cover the needs of the public travelling in and through the area. Because of the decreased need for building penetration in providing traveller's coverage, fewer transmitters are needed in a given market but greater

region.^{36/} Furthermore, if a region includes more than one RBOC region, a regional licensee should be required to construct at least one market in each RBOC region.^{37/} These requirements meet the public interest by requiring a licensee to distribute the service provided over the entire region, but also ensure that the coverage provided more closely mirrors the actual service that will be provided.

III. Additional Construction and Licensing Rules Are Needed

18. There are a number of construction and licensing issues that must be addressed in the final rules. First, the Notice requires construction of all systems to be completed within eight months absent a slow growth authorization.^{38/} The Notice fails to indicate, however, whether a license modification extends the construction deadline. Under the Commission's current Part 90 Rules, a license modification results in the issuance of a new license with a full construction period. Absent a clarification, a licensee could use license modifications to extend indefinitely the requirement to construct the initial system which led to the exclusive grant. This would

^{36/} Notice at ¶26.

^{37/} The nationwide requirement is 2 markets in each RBOC region. Notice at ¶26. Since regional licensees receive only one-quarter of the nation, and it may be difficult to find two markets in each RBOC region depending upon the licensee's region, one market makes more sense than two markets.

^{38/} Notice at ¶¶30-31.

obviously disserve the public interest.^{39/} Another problem may arise because under current procedures only 6 Part 90 transmitters are included on a single license. This means that a regional licensee might have 12 or more different licenses.^{40/} If some or all of these are granted at different times, there could be at least 12 different construction deadlines. PacTel proposes that the Commission process all applications required for an applicant to meet the minimum transmitter requirements on a consolidated basis, and require construction within eight months (or three years for slow growth status applicants) of a sufficient number of transmitters to meet the exclusivity standard regardless of whether modification applications are filed. This would ensure that licensees would not be able to constantly modify licenses to extend the construction deadline.

19. Second, the Commission proposes to extend slow growth status to PCP systems with greater than 30 transmitters.^{41/} PacTel supports this proposal. The Notice, however, fails to address whether this authority will be

^{39/} The Commission recognized the harm of "rolling over" protection through repetitive applications. Notice at n. 45. Using license modification to achieve the same goal would obviously not serve the public interest. Indeed, allowing licensees who have to modify their initial proposals additional time would reward applicants who failed to properly plan their systems in the first instance.

^{40/} The number of licenses received by a nationwide licensee is even greater. A nationwide licensee will receive at least



available to grandfathered licensees who would receive exclusivity on the date of the final order. PacTel believes that it makes no sense to extend that authority to later licensees and not to the current licensees. PacTel proposes that slow growth authority be made available to current licensees provided that they meet the other criteria for slow growth status, including financial requirements and/or a performance bond.

20. The Commission also proposes that applications for slow growth status include a showing of reasonable need for the extension, a detailed construction timetable, and evidence of financial ability to construct the system.^{42/} PacTel supports the adoption of rigid requirements in connection with slow growth applications, especially firm financial showings. PacTel believes that firm financial commitments in the cellular licensing arena have deterred some speculation.

21. The Notice also proposes performance bonds as a possible means to ensure licensee compliance.^{43/} PacTel supports the general approach of using bonds as a method of assuring the sincerity of an applicant. However, PacTel believes that a forfeiture bond rather than a performance bond is more reasonable and defensible. Performance bonds raise the difficulty of determining whether a performance bond relates in amount "to the loss that would be suffered by the public in the event the

licensee fails to construct".^{44/} Rather than structuring the bond as a performance bond, the Commission should view it as a forfeiture bond. Failures to construct a system granted slow growth status delay the implementation of needed services by other qualified applicants. If slow growth applicants are required to construct, then the Commission may properly impose fines and forfeitures if the licensees fail to satisfy these stated requirements. Section 403 of the Communications Act of 1934, as amended, sets a base forfeiture amount of \$10,000 per violation or per day of a continuing violation for failing to comply with a Commission rule or regulation. Using this as a starting point, the Commission should set a base forfeiture amount associated with the failure to construct any facility required to meet the minimum number of transmitters.^{45/}

22. The Notice proposes adoption of the common carrier 900 MHz paging separation and coverage tables. PacTel supports the use of these tables. These tables are the result of extensive examination and work by the paging industry and the Commission over the last several years. The Commission last year, however, adopted a Notice of Proposed Rulemaking to rewrite

^{44/} 900 MHz SMR NPRM at ¶40.

^{45/} Under the Commission's view that it would take 300 or more transmitters for a nationwide licensee, the Commission could set the forfeiture bond as high as \$3 million.

sections of Part 22 which governs common carrier paging licenses.^{46/} In that proceeding, several commenters proposed that these tables be altered to include minimum separation distances under 70 miles based upon lower power and heights.^{47/} If those proposals are eventually adopted, they should be incorporated into the Part 90 rules as well.^{48/}

23. The Notice proposes that transmitters must actually be transmitting 100 watts to count towards the minimum number of transmitters needed for exclusivity.^{49/} In contrast, NABER proposed that transmitters would count towards the minimums required if they were capable of emitting 100 watts E.R.P.^{50/} The NABER approach makes sense. The idea is to assure that

^{46/} Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, CC Docket No. 92-115 (released June 12, 1992).

^{47/} See, e.g., Comments of Comp Comm, Inc. in CC Docket No. 92-115.

^{48/} PacTel notes that there may be some ambiguity regarding the meaning of proposed Section 90.495(b)(4). This section could be interpreted to mean that licensees licensed as of the date of the final order have to accept interference from facilities built by other existing licensees regardless of when they were authorized. That is not the intended meaning, so PacTel suggests that the Commission explicitly state that interference must only be accepted from facilities which were licensed prior to the date of the final order.

^{49/} Notice at ¶32. The Notice provides that this requirement is superseded by the maximum output requirements set forth in Section 90.494(f). Notice at n. 48. A licensee, therefore, could construct with transmitters which are not capable of transmitting 100 watts E.R.P.

^{50/} NABER Petition at p. 13.

speculators not be able to hold spectrum with very inexpensive, low wattage transmitters which have no real ability to provide service to the public.^{51/} Any transmitter capable of operating at 100 watts represents a sufficient investment to be counted toward the minimum, even if for purposes of co-channel protection it is operated at less than 100 watts. PacTel proposes, therefore, that the Commission revise this provision in its rules.^{52/}

24. The Notice implies that 900 MHz PCP licensees may use up to 3500 watts effective radiated power.^{53/} Although not a subject of NABER's Petition, PacTel supports the use of higher power on these channels. The Commission has recently proposed

^{51/} The Commission has recently issued a Notice of Proposed Rulemaking on lifting the current prohibition against PCP licensees serving individuals. Amendment of the Commission's Rules to Permit Private Carrier Paging Licensees to Provide Service to Individuals, PR Docket No. 93-38 (released March 12, 1993). When that NPRM is ultimately adopted, those changes will need to be reflected in the proposed rules.

^{52/} PacTel suggests that Section 90.495(a)(4) be revised to read as follows:

No transmitter may be counted as part of a local, regional, or nationwide system under this section unless it is capable of a minimum output power of 100 watts, has simulcast capability, and is to be operated as part of the paging system for which channel exclusivity is sought.

^{53/} This is implied from the height/power table in Section 90.495(b)(1).

3500 watts E.R.P. for 900 MHz common carrier paging channels.^{54/} PacTel believes that the rationale supporting the common carrier paging power increase also supports a power increase for 900 MHz PCP frequencies.^{55/} The use of higher power would permit licensees to more economically and effectively provide service to the public.

25. The Commission has proposed that a licensee would be completely divested of its license in the event that it did not meet its construction obligations.^{56/} PacTel completely supports this proposal, but questions whether the Commission will grant waivers of this rule, and thus defeat it. PacTel suggests that this rule will only be effective if the Commission at the outset affirmatively states that waivers of this provision would

^{54/} Amendment of Part 22 of the Commission's Rules Pertaining to Power Limits for Paging Stations Operating in the 931 MHz Band in the Public Land Mobile Service, CC Docket No. 93-116 (released April 23, 1993).

^{55/} The Commission tentatively found such an increase in common carrier paging to serve the public interest.

We believe that this change would be in the public interest since it will afford the benefits of higher power operation without unduly increasing the risks of interference since the potential for interference is not increased with the operation of fewer transmitters at higher power. In addition, increased power limits will allow for greater flexibility for these paging systems since they could use fewer transmitters to cover the same geographic area with the concomitant result in efficiencies of scale, reduction of costs, and resulting benefits for consumers. Id. at ¶6.

^{56/} Notice at ¶30. This rule would act as the proverbial "death penalty" for licensees who failed to meet their construction deadlines.

only be granted for extraordinary circumstances completely beyond the control of the licensee.^{57/}

26. The Notice proposes that licensees who fail to construct within the appropriate construction deadlines will be divested of their licenses and that new applicants will be able to use finders preferences to secure a preference for the frequency.^{58/} PacTel supports this proposal. PacTel is concerned, however, that potential finders may need more information than would be available from the Commission's public records in order to effectively discover unbuilt facilities. For example, if a regional licensee failed to construct all the markets required in its region, that license would lapse. It is not clear to PacTel the extent to which the Commission's records will reflect the region applied for by the licensee. Accordingly, PacTel proposes that the Commission either revise its licensing rules to require specific delineation in applications and/or licenses of the regions served, or to require

^{57/} The Commission currently uses a similar standard for failures to construct Part 22 authorizations. See Section 22.43(b)(1) ("Extensions will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions will be granted for delays caused by lack of financing, lack of site availability,")

^{58/} Notice at ¶30.

NABER, upon request, to release to the public the geographic region applied for by licensees.^{59/}

27. In the Notice, the Commission adopted a freeze on applications because of the Commission's view that these proposals may have an impact on future availability of 900 MHz paging channels.^{60/} Subsequently, the Commission lifted the freeze citing the harsh impact the freeze had on existing licensees.^{61/} PacTel supports the Commission's action to lift the freeze, but shares the Commission's initial concern expressed in the Notice that there is a possibility for speculation. One alternative to meet both goals is to prohibit NABER from coordinating applicants onto a frequency currently licensed to a third party. This would prevent the possibility for speculation by limiting the areas and frequencies for which a speculator could file. PacTel suggests that the Commission immediately issue such a prohibition to NABER.

^{59/} PacTel understands that NABER currently may only release information which was subsequently filed with the Commission. It is not clear from the rules whether this information would be forwarded to the Commission and whether the Commission would actually be granting licenses with the regions stated on their face.

^{60/} Notice at ¶41.

^{61/} Commission Lifts Freeze on 900 MHz Private Radio Applications, Public Notice DC-2375 (released April 1, 1993).